In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1266

RICHARD DALE WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Oregon, petitioner and two co-defendants were convicted of mail fraud and conspiracy in the sale of lots in an Oregon real estate development. The court of appeals reversed their conviction and remanded the case for a new trial. *Phillips* v. *United States*, 356 F. 2d 297 (Pet. App. 1–24). While holding that other evidence was improperly admitted, the court ruled that it was permissible for purchasers of the lots who had received the brochures of the real estate development company

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with which petitioner was associated to testify that they received the impression from the brochures that the lots had advantages which they did not in fact possess. The court of appeals noted that, on a retrial, it expected the government to desist from asking leading questions in this area (Pet. App. 24).

Petitioner asks this Court at this stage to review the ruling that "impression" evidence is admissible. There is, however, no occasion to review the interlocutory judgment of the court of appeals remanding the case for a new trial. The evidence on retrial will necessarily be in a different context. To the extent that the opinion below represents a general ruling that persons relying upon sales material may testify to their understanding of the material, it is clearly correct. It is obviously relevant in a mail fraud case to show that purchasers relied upon promotional materials sent by the defendants. The evidence as to the purchaser's understanding of the material shows the reason for reliance. See *Linden* v. *United States*, 254 F. 2d 560, 566 (C.A. 4); *Haid* v. *United States*, 157 F. 2d 630, 632 (C.A. 9); *United States* v. *Baren*, 305 F. 2d 527, 534 (C.A. 2).[1] Since

[1] There is no conflict with the holding in *United States* v. *Kram*, 247 F. 2d 830 (C.A. 3). It was there held on a wholly different set of facts that the material mailed was not in fact misleading.

the brochures would be before the jury, it would be in a position to judge whether such reliance was reasonably contemplated by the defendants when they sent the materials.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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